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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4 and 17

[FAC 2005-67; FAR Case 2012-010; Item IV; Docket 2012-0010, Sequence 1]

RIN 9000-AM36

**Federal Acquisition Regulation; Interagency Acquisitions:
Compliance by Nondefense Agencies with Defense Procurement
Requirements**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are adopting as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to add new requirements specific to the acquisition of supplies and services by nondefense agencies on behalf of DoD. This rule implements a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008, with later amendments; and section 801 of the NDAA for FY 2013, Pub. L. 112-239.

DATES: Effective Date: **[Insert 30 days after publication in the FEDERAL REGISTER.]**

FOR FURTHER INFORMATION CONTACT: Ms. Patricia Corrigan, Procurement Analyst, at 202-208-1963 for clarification of

content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-67, FAR Case 2012-010.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the Federal Register at 77 FR 69720 on November 20, 2012, to implement the requirements of section 801 of the NDAA for FY 2008 (Pub. L. 110-181) as amended, (10 U.S.C. 2304 note). The interim rule made the following changes:

- Clarified FAR 4.603(c) regarding the allocation of socioeconomic credit to the requesting agency for assisted acquisitions.
- Created a new FAR subpart 17.7, which establishes the policy related to internal controls and compliance certification under which nondefense agencies may procure supplies and services on behalf of DoD and identified DoD acquisition official responsibilities to identify DoD unique requirements. The new FAR subpart 17.7 cross-references and is cross-referenced at FAR subpart 17.5, Interagency Acquisitions.

To implement the NDAA for FY 2013, this final rule changes "defense" to "applicable" in FAR 17.703(a) and (b).

Three respondents submitted comments on the interim rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of significant changes

No significant changes have been made in the final rule. However, the following minor changes have been made:

(1) References to the term "defense procurement" have been changed to "applicable procurement" in order to implement section 801 of the NDAA FY 2013, Pub. L. 112-239.

(2) Based on public comment, DoD class deviations have been included in the list of laws and regulations that apply to procurements of supplies and services made by DoD through other Federal agencies in FAR 17.703(b)(2).

B. Analysis of public comments

1. Location of coverage

Comment: Suggest that this coverage be moved to a new section within FAR subpart 17.5 (e.g., FAR 17.505). This way, the rule would be where readers would reasonably expect it to be and they would not have to move back and forth between subparts, which are typically located on different Web pages.

Response: To simplify locating the required regulations, a cross reference to FAR subpart 17.7 is included at FAR 17.500 and another cross reference to FAR subpart 17.5 is included at FAR 17.700.

2. Compliance with DoD class deviations

Comment: FAR 17.703(b)(2) does not mention DoD class deviations to the FAR and Defense Federal Acquisition Regulation Supplement (DFARS). If nondefense agencies will be required to comply with DoD class deviations, it is suggested that this be explicitly stated along with a Web address where they can be found.

Response: The rule was amended to reference DoD class deviations and the Web address where they can be found.

3. Definition of DoD "acquisition official"

Comment: The commenter knew what a contracting officer is, but wondered what a DoD "acquisition official" other than a contracting officer might be. The commenter added that "all approvals should be routed through the office of the contracting division that would otherwise write the contract."

Response: The term "Department of Defense (DoD) acquisition official" is defined in FAR 17.701, consistent with statute, and is used throughout FAR subpart 17.7. Specific guidance regarding designation of agency acquisition officials, their delegated authority, and

routing of contractual documents is more suitable for inclusion in agency regulations rather than the FAR.

4. Frequency of nondefense agency compliance certifications

Comment: The commenter sees no benefit in adhering to an "annual" fiscal year self-certification requirement that ensures a nondefense agency is compliant with defense procurement requirements. The commenter recommends, as a means of eliminating non-value-added paperwork for all parties and procurement delays, that DoD seek approval to change the nondefense agency self-certification requirement from "each fiscal year" to "every five years."

Response: The annual certification requirement for nondefense agencies that acquire supplies and services on behalf of DoD included in FAR subpart 17.7 is prescribed by law. The suggestion submitted by the commenter requires a statutory change that is beyond the scope of this FAR case.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and

benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

Implementation of section 801 of the NDAA for FY 2008 (Pub. L. 110-181), section 806 of the NDAA for FY 2010 (Pub. L. 111-84), section 817 of the NDAA for FY 2012 (Pub. L. 112-81), and section 801 of the NDAA for FY 2013 (Pub. L. 112-239) address requirements specific to the acquisition of property and services by non-defense agencies on behalf of DoD, and are therefore, internal to the Government.

However, this rule also amends the FAR to include a clarification at 4.603(c), restating existing Office of Federal Procurement Policy (OFPP) and Federal Procurement Data System (FPDS) policy regarding the allocation of socio-economic credit for assisted acquisitions, i.e., "for assisted acquisitions, the requesting agency will receive socio-economic credit for meeting small business goals, where applicable."

Although we do not expect the clarification to have a direct economic impact on a substantial number of small entities, there is the possibility that the regulatory clarification may improve the accuracy of FPDS data submissions allocating socio-economic credit to agencies for contracts and orders awarded to a substantial number of small entities. Improved data accuracy can have a positive impact on agencies' annual small business goals.

The interim rule was published as part of FAC 2005-62 on November 20, 2012 (77 FR 69720). None of the comments received concerned the initial regulatory flexibility analysis.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 4 and 17

Government procurement.

Dated: June 13, 2013

William Clark,
Acting Director,
Office of Governmentwide
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Office of Acquisition Policy,
Office of Governmentwide Policy.

INTERIM RULE ADOPTED AS FINAL WITH CHANGES

Accordingly, the interim rule amending 48 CFR parts 4 and 17, which was published in the Federal Register at 77 FR 69720, November 20, 2012, is adopted as final with the following change:

PART 17-SPECIAL CONTRACTING METHODS

1. The authority citation for 48 CFR part 17 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 17.703 by—

a. Removing from paragraph (a) and the introductory text of paragraph (b) “with defense” and adding “with applicable” in its place; and

b. Revising paragraph (b)(2).

The revised text reads as follows:

17.703 Policy.

* * * * *

(b) * * *

(2) Laws and regulations that apply to procurements of supplies and services made by DoD through other Federal agencies, including DoD financial management regulations, the Defense Federal Acquisition Regulation Supplement (DFARS), DoD class deviations, and the DFARS Procedures,

Guidance, and Information (PGI). (The DFARS, DoD class deviations, and PGI are accessible at:

<http://www.acq.osd.mil/dpap/dars>).

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